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MONTANA PROSECUTOR

MARCH - AUGUST, 1981 No. 5, Vol. 7

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INTRODUCTORY NOTES

At the annual MCAA convention at Fairmont Hot Springs from July 22 to July 25, 1981 the following persons assumed the offices designated as a result of election or appointment and will hold such offices until the 1982 convention.

Officers:

President: Robert J. Brooks, Powder River County
First Vice-President: Keith Haker, Custer County
Second Vice-President: Donald E. White, Gallatin County
Third Vice-President: James E. Seykora, Big Horn County
Secretary: John L. Pratt, Musselshell County
Treasurer: John T. Flynn, Broadwater County

Board of Directors:

Allin H. Cheetham, Choteau County
Charles A. Graveley, Lewis and Clark County
Conrad B. Fredricks, Sweet Grass County
Richard P. Heinz, Lake County
Ed Laws, Stillwater County
Robert L. Deschamps, III, Missoula County
NDAA Representative

Committee Appointments:

Nominations

Denzil Young, Fallon County
Jim McCann, Roosevelt County

Convention and Site

Ronald Smith, Hill County
Rae Kalbfleisch, Toole County
Douglas Anderson, Pondera County

Legislative

Charles Graveley, Lewis and Clark County
Robert Deschamps, III, Missoula County
Don White, Gallatin County
Ted Lympus, Flathead County

Resolutions

Conrad Fredricks, Sweet Grass County

Audit

Executive Committee

Training

William Spoja, Fergus County
Roy Rodeghiero, Golden Valley County
Duke Gilbert, Beaverhead County

Gambling

C. Ed Laws, Stillwater County
Harold Hanser, Yellowstone County
Keith Haker, Custer County

Indian Jurisdiction

Dick Heinz, Lake County
Jim Seykora, Big Horn County
Ron Smith, Hill County
Jim McCann, Roosevelt County

Permanent Wine Committee

J. Fred Bourdeau, Cascade County
Jim McCann, Roosevelt County
Alternate - Keith Haker, Custer County

Salary Commission

Willis McKeon, Phillips County

STATE TELEPHONE DIRECTORY

State telephone directories are available for $1.00 plus postage from the Department of Administration, Communications Division, Room 222, Mitchell Building, Helena, Montana 59620, 449-2586.

REPORT - 1981 NDAA SUMMER MEETING

The report of Robert L. Deschamps, III, the MCAA Representative to the National District Attorneys Association, concerning the 1981 Summer Meeting is enclosed.

BASIC TRAINING FOR LAW ENFORCEMENT OFFICERS

A letter from the Attorney General directing attention to the requirements of basic training for law enforcement officers is enclosed. Because of the possible financial liability of local governmental units under 42 U.S.C. 1983 due to failures to provide adequate training, emphasis should be focused upon the administrative and statutory directives mentioned in the letter.

TRAINING

Although funds for out-of-state training are not available, a schedule of training seminars is nonetheless enclosed in the

event that local funding can be procured. A training seminar to be presented in Billings in early December is presently in the planning stage. As details become clearer notification will be made.

RETAINED COUNSEL EXPENSES - PROPERTY TAXES AND BANKRUPTCY

Enclosed are two informal opinions from the Attorney General in reference to the county's liability for expenses incurred by privately employed counsel and whether the county treasurer should file claims in bankruptcy proceedings for delinquent property taxes.

BREATHALYZER TESTS

The Supreme Court of Oregon has held that when a defendant submits to a breathalyzer test only after demanding and being denied an opportunity to seek the advice of counsel, and not due to any practical obstacle, the test results are not obtained with the defendant's voluntary and informed consent and cannot be used in evidence against him. Therefore, his conviction for driving under the influence of intoxicants must be set aside. State v. Scharf, 605 P.2d 690, Ore., 1980.

PROSECUTION ARGUMENT - IMPROPER REFERENCES TO POLICE DOING THEIR JOB

Comments of a prosecutor in his closing argument that the "police officers had nothing against this man, they simply get paid to do a job. If he was innocent, they would certainly have cleared him," were unfair and prejudicial and denied defendant his right to a fair trial. Cumbie v. State, 378 So. 2d 1, Fla.App., 1978.

SEARCH WARRANTS - AFFIDAVIT - FAILURE TO SIGN

It has been held that the unintentional absence of a search warrant applicant's signature does not render an attempted affidavit ineffective, where the applicant complies with every other statutory requisite by attesting under oath to the facts establishing probable cause, if the purported written affidavit identifies the officer as the affiant, and if the issuing magistrate knows the officer and is certain of his identity. State v. Roudion, 378 So.2d 411, La., 1979.

SEARCH WARRANTS - EXECUTION - DELAY

A delay of six days in executing a search warrant for the defendant's residence was not unreasonable or prejudicial and did not constitute a violation of a statutory requirement (M.S.A. section 626.11) that search warrants be executed "forthwith", and in any event within 10 days after their issuance. Nor did the delay constitute a constitutional violation rendering stale probable cause to believe that marijuana would be found at defendant's residence. State v. Yaritz, 287 N.W.2d 13, Minn. 1979.

SEARCH INCIDENT TO ARREST

Where a defendant was standing close to an automobile door jamb with his hands placed on top of the car at the time that an arresting officer ran his hand underneath the front seat, the area around the front seat of the car was within the defendant's immediate control, and therefore a seizure of a gun from under the front seat was effected by a search incident to a lawful arrest and was ruled proper. State v. Hunter, 261 S.E.2d 189, N.C., 1980.

WARRANTLESS SEARCH - EMERGENCY DOCTRINE - PLAIN VIEW - GENERAL SEARCH

Where police officers made a lawful warrantless entry into defendant's apartment on the basis of the need to determine whether the occupant of the apartment was "in need of immediate aid" after the landlady reported an unusual odor emanating from the apartment, they were entitled to seize evidence in plain view. However, where the officers, who had no knowledge or even information that defendant had committed any crime, proceeded to make a general search of the entire apartment, this was an unlawful general search. United States v. Presler, 610 F.2d 1206, 4th Cir., 1979.

CONSENT - LANDLORD

Where the defendant, while in jail, called the place at which he had been staying to make arrangements to pick up his clothing, and he was told that he could not have his clothing until he paid certain past-due rent and that his clothes would be held for 60 days and then turned over to charity, he had a legitimate expectation of privacy with respect to his clothing during those 60 days, and the place at which he had been staying had no authority to consent to a search of his clothing during that time. United States v. Prescott, 480 F.Supp. 554, Pa., 1979.

MIRANDA - ADVISEMENT OF RIGHT TO COUNSEL - REFERENCE TO NECESSITY OF COURT APPOINTMENT

A statement by a chief of police during interrogation to the effect that defendant could not talk with a public defender until one had been appointed by the trial court vitiated the Miranda warnings previously given to the defendant. The statement was not only misleading and confusing regarding the right to counsel prior to interrogation, it was a misstatement of applicable state law. Cribbs v. State, 378 So.2d 316, Fla.App., 1980.

MIRANDA - WAIVER - INITIAL REQUEST FOR COUNSEL - SUBSEQUENT INTERROGATION BY DIFFERENT INVESTIGATING OFFICERS

An in-custody statement by a defendant to a non-investigating officer to the effect that "I'd rather see an attorney" constituted a request for counsel. However, the defendant subsequently and effectively waived that request where he stated, two days later, that "I don't need a lawyer," and he was then given his Miranda warnings before each subsequent interrogation by investigating officers, who understandably were never informed of the defendant's prior request for counsel. Defendant signed a written waiver of rights and ultimately signed a confession. White v. Finkbeiner, 611 F.2d 186, 7th Cir., 1979.

SEMEN SAMPLES - PRESERVATION OF EVIDENCE - PEOPLE V. HITCH

The Supreme Court of California has held that where the state recovers a semen sample of a defendant suspected of having committed a sexual assault or perpetrating a rape or attempted rape, the State must take reasonable measures to adequately preserve such evidence and to make it available to the defense. Evidence lost to the defense because of its destruction by the authorities will be deemed "material" for the purpose of triggering the exclusionary rule of People v. Hitch, 527 P.2d 361 (Cal., 1974) if there is a reasonable possibility that it would be favorable to the defendant on the issue of guilt or innocence. In Hitch the California Supreme Court held that there is an obligation to disclose the existence of material evidence even without a request therefor, and directed that in the future law enforcement agencies take reasonable measures to ensure its adequate preservation. People v. Nation, 604 P.2d 1051, Cal., 1980.

BREATHALYZER TESTS - RIGHT TO BE ADVISED OF INDEPENDENT BLOOD-ALCOHOL TEST

The Supreme Court of Alaska has held that neither statute (AS28.35.030, 28.35.032(a-c) nor any provision of the State or Federal Constitutions requires that a motorist who is compelled to submit to a breath test be advised of his right to obtain an independent blood-alcohol test. Palmer v. State, 604 P.2d 1106, Alaska, 1979.

EVIDENCE OF A DEFENDANT'S POST-ARREST SILENCE - IMPEACHMENT

While the State generally may not use a defendant's post-arrest silence to impeach his exculpatory testimony at trial, where the defendant tried to show that the police were not interested in hearing his version of what happened, the prosecutor was properly permitted to show that, once at the station house, the police unsuccessfully tried to obtain a complete statement from defendant concerning his version of the facts. State v. Hjerstrom, 287 N.W.2d 625, Minn., 1979.

BURDEN OF PROOF - FLIGHT

"Since flight is not an element of this offense [theft in the second degree], there is no constitutional requirement that it be found by proof beyond a reasonable doubt. The only requirement is that when it considers all the evidence, including the fact of flight, the jury must be convinced of all the elements of the crime beyond a reasonable doubt." State v. Savage, 288 N.W.2d 502, Iowa, 1980.

WITNESS - REDIRECT - NARCOTICS CASES - TESTIMONY CONCERNING NORMAL PROCEDURES

Where defendant's attorney sought to attack the credibility of a drug agent on cross-examination by questioning the agent as to the lack of photographs or records of an alleged narcotics buy, it was proper for the prosecution on redirect to illicit facts from the agent as to "normal" procedures with respect to hand-to-hand narcotics buys. United States v. Peters, 610 F.2d 338, 5th Cir., 1980.

PRIVATE INVESTIGATOR - GUIDELINES FOR DETERMINING APPOINTMENT

A decision whether to appoint a private investigator for an indigent defendant is within the trial judge's sound discretion, but such an appointment should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. The trial court did not abuse its discretion in denying the indigent defendant's request for the appointment of a private investigator, since his allegations and representations as to the identity of one missing witness were so vague as to suggest on their fact that a search for him would be futile, and since, as to the other missing witness, it appeared that his whereabouts were well-enough known to defendant and his appointed counsel to enable them, with due diligence, to locate him without further assistance. State v. Carson, 264 S.E.2d 404, N.C.App., 1980.

EXPERTS - GUIDELINES FOR DETERMINING APPOINTMENT

Basic principles behind statutes providing for payment of experts for indigent defendants include recognition that an indigent criminal defendant, in order to have the effective assistance of counsel, may require assistance of one or more experts to assist counsel in presentation of his case, and that basic principles of due process demand that such defendant should not be deprived of the ability to have relevant expert testimony to counter the State's experts. Under a statute governing payment of fees and expenses, a request for additional expert fees should be made in writing. A request should detail why the expert is needed. Defense counsel should be permitted an opportunity to elaborate on the motion; and in denying the motion, the trial judge should place in the record the specific reasons for his ruling. In evaluating a defendant's motion for additional expert fees, a trial judge should accord considerable weight to the representations in defense counsel's motion, but he should also engage in an independent inquiry as to the need for the expert if he believes that such inquiry is necessary. In ruling on a defendant's motion for additional expert fees, the trial judge should grant the motion if he determines that the assistance of the expert is reasonably necessary to defense counsel's development of the relevant issues. The defendant is not entitled to an expert on collateral or frivolous issues. Code, 51-11-8. State ex rel. Foster v. Luff, 264 S.E.2d 477, W.Va., 1980.

PROSECUTION ARGUMENT - CHARACTERIZATION OF DEFENSE THEORY AND DEFENSE ATTORNEY - "FRAUD" - "RUNNING WILD"

In a prosecution for murder and other crimes, a prosecutor's characterization of a defense theory as "fraud", "fictional", "phony", and "poppycock", and the prosecutor's statement that defense counsel's imagination was "running wild", when seen in the light of defense counsel's provocative closing argument, did not constitute reversible error. People v. Gaskins, 402 N.E.2d 258, Ill.App., 1980.

ARREST - WHEN IT OCCURS - FORMAL DECLARATION - REASONABLE MAN TEST

No formal declaration of arrest is necessary for an arrest to occur, but the absence of such a declaration, as well as a search of, or failure to search, the defendant are factors to be considered in determining a police officer's intent and whether a reasonable person, innocent of any crime, would have believed himself or herself to be under arrest. Where police officers approached the defendant, identified themselves as police officers, ordered him to assume a search position on a squad car and proceeded to search defendant, they had the authority to make an arrest, asserted that authority and restrained defendant, and thus an arrest had in fact been made at the time of the search, notwithstanding the fact that the officers failed to declare that defendant was under arrest. While the standard of whether a reasonable person, innocent of any crime, would have thought he had been arrested had he been in defendant's position does apply to a determination of whether a defendant was in such custodial situation as to require Miranda warnings, it is irrelevant to the question of whether defendant was in fact arrested. People v. Brown, 401 N.E.2d 310, Ill.App., 1980.

WARRANTLESS ARREST - WARRANT REQUIREMENT - HOT PURSUIT - MOTEL ROOM

Where an officer had probable cause to arrest defendant after inspection of burglarized premises and discussion with its owner, defendant was a transient living in a motel who could depart at any time, the officer was aware upon his arrival at the motel that defendant was inside a room and probably in possession of contraband taken in the burglary, and had the officer delayed for the time it might take to obtain a warrant, defendant and the contraband could have disappeared, the "hot pursuit" doctrine applied, and a warrantless entry into defendant's room and his arrest were proper. State v. Hendricks, 610 P.2d 940, Wash.App., 1980.

WARRANTLESS ARREST - PROBABLE CAUSE - NARCOTICS - SLANG EXPRESSIONS

A police informant's observation of an envelope containing numerous foil packets, commonly used to package heroin, in a defendant's possession and one defendant's statement to the informant that they had some "boy" for sale, "boy" being a common street term (slang) for heroin, was sufficient to establish probable cause for arrest of the defendants. State v. Booker, 380 So.2d 1309, Fla.App., 1980.

SEARCH WARRANTS - PARTICULARITY OF DESCRIPTION - LOTS

Although a lot upon which defendant's trailer was located was different from the address contained in an affidavit and search warrant, where these documents gave the address used by the defendant himself on various occasions and stated the name of the defendant, they described with reasonable certainty and particularity the trailer to be searched, especially since there were only two trailers at the rural address and one of them had a sign on it identifying it as belonging to someone other than the defendant. State v. Madsen, 609 P.2d 1046, Ariz., 1980.

SEARCH WARRANTS - SCOPE - PREMISES - SEWER HOSE

A search pursuant to a search warrant authorizing the police to search a mobile home may include all property logically constituting a part of the premises, and a hose which ran from a trailer to a sewer connection on the ground was part of the mobile home, and thus the police did not exceed the scope of the warrant when they disconnected the sewer hose and recovered heroin as it was being flushed down the toilet by someone in the mobile home. State v. Dixon, 610 P.2d 76, Ariz.App., 1980.

SEARCH INCIDENT TO ARREST - SCOPE - DEFENDANT'S POCKETS - RELATION TO CRIME DEFENDANT HAS BEEN ARRESTED FOR

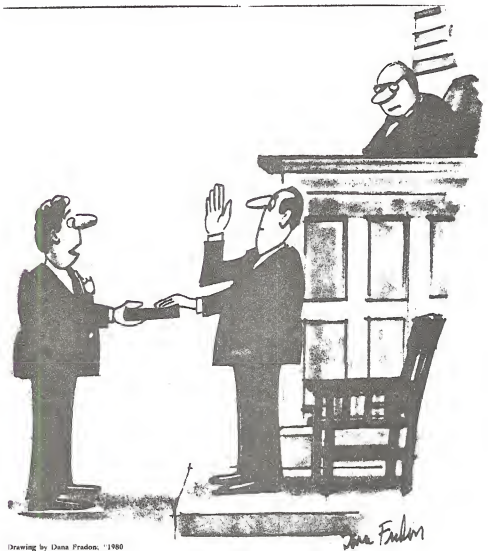
Search of a defendant's pockets following his arrest was lawful even though defendant had already been frisked for weapons and, under the circumstances, could not be in possession of the fruits and instrumentalities of the crime for which he was arrested. An officer, after a custodial arrest, may properly search a defendant and seize all contraband or articles the possession of which gives the officer reason to believe a crime has been committed, even though such articles do not relate to the crime for which the defendant was initally arrested. The limitations imposed in Hernandez v. People, 385 P.2d 996 are no longer viable in Colorado. People v. Traubert, 608 P.2d 342, Colo., 1980.

STOP AND FRISK - REASONABLE SUSPICION - UNPROVOKED VERBAL ATTACK - CONSTITUTIONALLY PROTECTED SPEECH

Where a juvenile made an unprovoked and obscene verbal attack on police from a window of an automobile and the officers observed the defendant drinking something, they were justified in stopping the automobile, which led to their observation of a liquor bottle and their detection of alcohol odor on the juvenile's breath, notwithstanding the fact that the juvenile's words, taken alone, were constitutionally protected. D.C.E. v. State, 381 So. 2d 1097, Fla.App., 1979.

STOP AND FRISK - REASONABLE SUSPICION - FRISK CONDUCTED DURING THE EXECUTION OF A SEARCH WARRANT

In the absence of any factual basis to justify a police officer's suspicion that the defendant was armed and dangerous, a pat-down search of the defendant during the execution of a warrant to search his residence was a violation of the Fourth and Fourteenth Amendments. Except in those situations in which there is at least an articulable and reasonable suspicion that an individual is armed and dangerous, a protective search for weapons is unreasonable under the Fourth Amendment as applied to the states by the Fourteenth Amendment. Bell v. State, 608 P.2d 1159, Okl., 1980.



Drawing by Dana Fradon. ©1980 The New Yorker Magazine Inc.

"Do you swear to tell the truth, the whole truth, and nothing but the truth, even if it would be bad timing?"

PRISONS - SENTENCES - CRUEL AND UNUSUAL PUNISHMENT

"Double celling" prisoners is not cruel and unusual punishment where other conditions are adequate. An increase in the delay before receiving education and a decrease in work hours are not punishment. Rhodes v. Chapman, 29 Cr.L. 3061, June 15, 1981.

MIRANDA - COUNSEL - VOLUNTARINESS OF STATEMENTS

In what may be a facts-oriented decision, the United States Supreme Court says:

> [A]nd we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

Edwards v. Arizona, 29 Cr.L. 3037, May 18, 1981.

DEA ADMINISTRATIVE SUBPOENAS UPHELD IN CRIMINAL CASES

In an enforcement action brought in the District of Wyoming by Assistant United States Attorney Jeffrey C. Fisher and DEA Attorney Elizabeth M. Edson, Chief Judge Clarence A. Brimmer issued an opinion on March 27, 1981, approving the use of DEA subpoenas in criminal investigations. The case arose after Mountain Bell Telephone Company refused to honor a DEA subpoena, issued under 21 U.S.C. §876, for telephone toll records needed to continue an investigation of a suspected marihuana and cocaine smuggler. Although DEA and its predecessor agencies have long utilized administrative subpoenas to obtain telephone toll records during criminal investigations, Mountain Bell's refusal to honor the subpoena was based upon issues raised during an unrelated criminal case in the District of Colorado. There, the Chief Judge had expressed on several occasions his belief that DEA's use of administrative subpoenas for criminal investigations was both unauthorized by the statute and unconstitutional. Although the issue has been litigated for almost a year in the District of Colorado, no written opinions have resulted. Two other district court opinions, both of which support DEA's position, were issued last summer in other criminal cases but remain unpublished pending appeals on other issues. See United States v. Hossbach, Cr. No. 80-148 (E.D. Pa., order dated July 15, 1980) and United States v. Enriquez, No. CR 78-287 PHX-CAM (D. Arizona, order dated June 18, 1979).

Judge Brimmer's opinion sets forth a clear analysis of the broad authority provided to DEA by 21 U.S.C. §876, including a review of the legislative history and intent of Congress in enacting the statute.

WEAPONS - DANGEROUS WEAPONS - SHOE OR BOOT

A shoe as well as a boot may be considered a dangerous weapon under a felonious assault statute since it is an object that may be used in a dangerous manner. In a prosecution for felonious assault wherein the defendant allegedly repeatedly kicked a police officer in the groin area while the officer was attempting to arrest defendant, whether a shoe worn by the defendant was a dangerous weapon was for the fact-finder. People v. Hale, 292 N.W.2d 204, Mich.App., 1980.

DISCOVERY - PRODUCTION OF INFORMATION FOR TRIAL - DISAPPEARANCE - ROLE OF PROSECUTION

Even though a defendant made a preliminary showing that an informant, whose whereabouts were unknown, might have information that would support his position at trial, he was not entitled to an automatic dismissal of the charges against him, where the people had not contributed in any way to the disappearance of the informant and had acted with a reasonable diligence in attempting to locate the informant when it became apparent that his testimony might be relevant to defendant's case. People v. Maneiro, 403 N.E.2d 176, N.Y., 1980.

SEARCH AND SEIZURE - ARREST - SEARCH INCIDENT - SEARCH WARRANTS - CONTAINERS - VEHICLES - LUGGAGE

When an officer has lawfully arrested the occupant of a vehicle he can search the entire passenger compartment of the car, including but not limited to; closed glove compartments, luggage, boxes, bags and clothing, as part of a search incident to arrest. The search must be "contemporaneous" with the arrest and may not include the trunk of the car. New York v. Belton, 29 Cr.L. 3115, July 1, 1981.

SEARCH AND SEIZURE - AUTOMOBILE EXCEPTION - VEHICLES - CONTAINERS - LUGGAGE

The automobile exception does not allow officers to search closed, opaque containers in the trunk of a car unless the contents are obvious. NOTE: If you've got a case like this, read the whole opinion, including footnotes and dissents, in order to determine what kind of record is necessary. Robbins v. California, 29 Cr.L. 3115, July 1, 1981.

ARREST - SEARCH WARRANTS - SEARCH AND SEIZURE - STOP AND FRISK - DETENTION

"[W]e hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Therefore, the police could stop the owner of the house outside the house and require him to go back inside. A search incident to arrest, after drugs had been found in the basement, disclosed heroin. Michigan v. Summers, 29 Cr.L 3097, June 22, 1981.

RIGHT TO PRIVACY - REASONABLE EXPECTATION - MARIJUANA GARDEN - AIRPLANE

An aerial search of the defendants' marijuana garden aided with high-powered binoculars did not constitute an unreasonable search proscribed by the Fourth Amendment. Thus, a warrant obtained upon information acquired as a result thereof was not invalid where, aside from fact that officers were flying at normal heights and observed the marijuana garden from a place where they had a right to be, defendants did not demonstrate any reasonable expectation of privacy. The marijuana cultivation was in plain view, and the officers made their initial observation with the naked eye and only used binoculars thereafter to positively identify the green-looking vegetation bearing the indicia of marijuana. People v. St. Amour, 163 Cal. Rptr. 187 Cal.App. 1980.

MIRANDA - WAIVER - FAILURE TO NOTIFY DEFENDANT'S COUNSEL OF INTERROGATION

A trial court did not abuse its discretion in refusing to suppress statements made by an accused to police officers, who knew that the accused was represented by counsel but who did not notify counsel that a statement was being made, to the effect that the accused was one of those who committed an assault with intent to rob, where the evidence with reference to whether the accused was advised of his constitutional rights and whether he waived those rights was conflicting. A failure of the police to notify counsel who represents a defendant, when they have knowledge of the fact of such representation, will not render a statement made by the defendant inadmissible where the record reveals a voluntary relinquishment and waiver by the defendant of his right to have counsel present during cutodial interrogation. State v. Jackson, 290 N.W.2d 458, Neb., 1980.

MIRANDA - APPLICABILITY TO PRELIMINARY BREATH TESTING

The privilege against self-incrimination does not extend to the results of roadside sobriety testing merely compelling an exhibition of physical characteristics, and a person need not be given Miranda warnings prior to a request for submission to such a test. The court disapproved Serratore v. People, 497 P.2d 1018. People v. Ramirez, 609 P.2d 616, Colo., 1980.

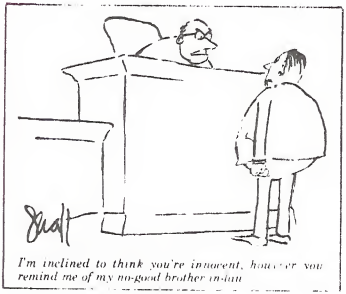
AIDING AND ABETTING - SPOUSES

When one spouse commits a crime which lasts over a period of time during which the other spouse stands by, sees the crime being committed, but comforts and consorts with the perpetrator, the other spouse may be considered and aider and/or abettor without actually participating in the crime. Maddux v. Rose, 483 F.Supp. 661, Tenn., 1980.

FORFEITURE - HOUSE AS "CONTAINER" UNDER §881(a)(3)

On March 5, 1981, upon motion of the government for entry of default and for judgment, the District Court for the District of Massachusetts ordered the forfeiture of a house in Bolton, Massachusetts, pursuant to 21 U.S.C. §881 (a)(3). United States v. One Single Family Residence, Civ. No. 80-2519-K (D. Mass., judgment dated March 5, 1981). The action, instituted by civil complaint on November 10, 1980, by Assistant United States Attorney Marianne B. Bowler, Civil Division, United States Attorney's Office for the District of Massachusetts, had sought forfeiture of the split level ranch-type house and 7.2 acres of surrounding land valued at over $155,000 based upon the house's being used or being intended for use as a container of drugs. (A residue of marihuana had earlier been found there.)

This use of 21 U.S.C. §881(a)(3), characterizing the house as a "container," is the first known case of the drug forfeiture statute being used to effect a forfeiture of a house other than as traceable proceeds of drug trafficking, under §881(a)(6).



I'm inclined to think you're innocent, however you remind me of my no-good brother-in-law

TO: Membership, Montana County
Attorneys' Association

FROM: Robert L. Deschamps, III
Director, National District
Attorneys' Association

RE: Report on Summer 1981 Meeting

While you were attending the County Attorneys' Convention, I was at the National District Attorneys' Association summer meeting in Orlando, Florida. Perhaps the most important thing I learned is that you do not want to go to Florida in July, unless you have some perverted desire to live in a turkish steam bath twenty-four hours a day.

At the Board of Director's meeting, an unsuccessful attempt was made to get more rural, Western officers in the organization. A strong feeling exists among those of us from the West that the NDAA presently tends to have an East Coast country-club orientation and we would like to break that up some, but lacked the votes in Orlando to do it. However, the seeds have been planted, and future efforts should be fruitful.

The new president-elect, Newman Flanagan, is the District Attorney in Boston. Several of us approached him with our concerns, and he has agreed to come West in early February. I have asked Marc to try to set up a meeting for that time so we can meet with him and give him ideas on how the NDAA can better serve Western prosecutors.

I am pleased to report that the NDAA has liquidated all its debts and currently has over $100,000 in the bank. Now that the financial crisis seems to be resolved, you should be seeing more membership services, such as the recent change to monthly "Case and Comment" newsletters. However, in keeping with the NDAA's new presence in Washington, D.C., heavy emphasis will be focused on federal legislation and other national concerns.

For example, NDAA was one of the two national organizations called upon to review the qualifications of Supreme Court appointee, Sandra O'Connor. This was done by the Board of Directors, which voted to recommend her for confirmation by the Senate.

We were also addressed by U.S. Attorney General, William French Smith, with his speech getting national television and press coverage, as well as the head of the Justice Department's Criminal Division, who is a former District Attorney and NDAA officer.

Both officials indicated a desire to enhance federal-state-local cooperation, and a renewed effort against drug trafficking. Notably, there was no mention of any plans to revitalize LEAA or anything like it.

Several pieces of legislation came up, notably S. 1885, a federal law to do away with the exclusionary rule as well as a new Colorado law which limits the exclusionary rule in that state. Marc has copies of both for our future consideration.

Another item of local interest was a presentation on behalf of the National College in Houston. Several states have gone to major corporations in their states and obtained grants for tuition to college. We should consider this approach in Montana to replace LEAA funds.

Numerous other items were also handled, including efforts to head off an ABA standards study which will limit prosecutorial discretion; efforts to limit access to federal courts by state defendants; a broad emphasis on the county civil responsibilities of many prosecutors; community drug education programs, and more.

I would be happy to discuss these items or any aspect of the NDAA with any of you at any time. I would be particularly interested in any ideas any county attorney has on services the NDAA can provide us.

23.14.402 MINIMUM STANDARDS FOR THE EMPLOYMENT OF PEACE OFFICERS (1) The objectives of the Montana peace officers standards and training advisory council are to raise the level of competence of state and local law enforcement officers by promulgating, through the board of crime control, regulations establishing minimum standards for the selection, professional development, and training of such officers. Law enforcement is of such a nature as to require education and training of a professional character to insure the fair and equal application of law enforcement throughout the State of Montana.

23.14.401 (11) The (Montana peace officers standards and training advisory) council shall recommend to the board of crime control rules and regulations with respect to:

(e) The requirements of the minimum basic training which law enforcement officers appointed to probationary terms shall complete before being eligible for permanent appointment, and the time within which such basic training must be completed following such appointment to a probationary term.

(f) The requirements of minimum basic training which law enforcement officers not appointed for probationary terms but appointed on other than a permanent basis, shall complete in order to be eligible for continued employment or permanent appointment, and the time within which such basic training must be completed following such appointment on a non-permanent basis.

23.14.401 (17) No person shall, after the effective date of this regulation, receive an original appointment on a permanent basis as a law enforcement officer as defined in this regulation, unless such person has met the minimum employment standards established by the board and has previously been awarded a certificate by the board attesting to his satisfactory completion of an approved state, county, or municipal police basic training program; and every person who is appointed on a temporary basis or for a probationary term or on other than a permanent basis as a law enforcement officer as defined in this regulation, shall forfeit his position as such unless he previously has satisfactorily completed, or within the time prescribed by regulations promulgated by the board of crime control, satisfactorily completes an approved basic training program at a law enforcement school and is awarded a certificate by the board attesting thereto and has met the minimum employment standards established by the board.

STATE
OF
MONTANA
ATTORNEY GENERAL
MIKE GREELY
STATE CAPITOL, HELENA, MONTANA 59601 TELEPHONE (406) 449-2026

20
April
1981

Richard P. Heinz, President
Montana County Attorneys Association
Lake County Attorney's Office
Polson, Montana 59660

John Onstad, President
Montana Sheriffs and Peace Officers Association
Gallatin County Sheriff's Office
Bozeman, Montana 59715

Gene Kiser, President
Montana Chiefs of Police Association
Billings Police Department
Billings, Montana 59103

Mike Stephen, Executive Director
Montana Association of Counties
1802 11th Avenue
Helena, Montana 59601

Dan Mizner, Executive Director
Montana League of Cities and Towns, Inc.
1728 9th Avenue
Helena, Montana 59601

RE: BASIC TRAINING FOR LAW ENFORCEMENT OFFICERS

Gentlemen:

Please be advised that the Administrative Rules of Montana provide as follows:

Peace Officers Standards and Training

23.14.401 ADMINISTRATION OF PEACE OFFICERS STANDARDS AND TRAINING (1) Rules and regulations of the board of crime control on minimum standards for employment as a law enforcement officer, for equipment and for procedures; requiring basic training for law enforcement officers appointed after the effective date of this regulation; providing for the appointment of a peace officers standards and training advisory council; and providing for the administration of these rules and regulations and for the adoption of necessary regulations as provided by section 44-4-301 M.C.A.

23.14.401 (6) For the purposes of this regulation the term "law enforcement officer" shall mean the undersheriffs and deputy sheriffs of each county, the members of the police force of every city or town, the marshals of every town, state highway patrolmen, state fish and game wardens, any reserve, special, part-time, and auxiliary police officers of deputy sheriffs who are given general police powers to enforce the state laws and city ordinances, and all persons employed to police and enforce the law on the campuses of the public and private colleges and universities located in this state.

23.14.405 REQUIREMENTS FOR THE BASIC CERTIFICATE
(4) All of the training and equivalency requirements for the Basic Certificate must be accomplished within one year of the initial appointment.

In addition, you are also advised that MCA 7-32-2106 provides as follows:

7-32-2106. Attendance at Montana law enforcement academy required for deputy sheriffs. (1) It shall be the duty of the sheriff to cause all deputies whose term of employment commenced subsequent to March 2, 1967, to attend that academy provided for by Title 44, Chapter 10, except that the sheriff may accept reasonable delays in attendance at the academy as shown by the deputy's declared intention of attending.

(2) Failure to satisfactorily complete the course offered by said academy shall be deemed cause to terminate a deputy's employment.

Your attention is being directed to the foregoing sections of the Administrative Rules of Montana and of the Montana Codes Annotated in order to apprise you that failure to have complied with the provisions thereof may seriously exacerbate the vulnerability of counties/cities/towns to serious financial liability in the event of litigation under 42 U.S. Code 1983 (or other similar suits) alleging unlawful conduct by law enforcement officers.

Accordingly, it is recommended that you apprise the members of your respective organizations and constituencies of the contents of this letter.

Furthermore, it is suggested that the Montana Law Enforcement Academy, 620 So. 16th Street, Bozeman, Montana 59715 (telephone 994-3918) be contacted concerning any questions about scheduling law enforcement

officers for attendance at one of the Academy's mandatory basic training courses.

Be assured of our continued interest in all matters of mutual concern and of our willingness to cooperate in any way possible.

Yours truly,

MIKE GREELY
Attorney General

NATIONAL COLLEGE OF DISTRICT ATTORNEYS

CALENDAR OF PROGRAMS FOR PROSECUTORS

	Setember	
30 - October 3	Trial Advocacy For Prosecutors (NCDA)	Kansas City, Missouri
	October	
11 - 16	Prosecutor's Investigators School (NCDA)	Huntsville, Texas
	November	
1 - 5	Trial Advocacy For Prosecutors (NCDA)	West Palm Beach, Florida
15 - 18	Prosecutor's Role In Investigations (NCDA)	Denver, Colorado
	January 1982	
10 - 15	Applied Trial Techniques (NCDA)	Houston, Texas
24 - 27	Civil Law (NCDA)	Western Location To Be Announced
	February	
7 - 11	Trial Advocacy For Prosecutors (NCDA)	San Francisco, California
21 - 25	Prosecution Of Violent Crime (NCDA)	Altanta, Georgia
	March	
14 - 19	Prosecutor's Office Administrator Course - Part II (NCDA)	Houston, Texas
28 - April 2	Experienced Prosecutor Course (NCDA)	Pacific Grove, California

April 1982

4 - 8	Organized Crime (NCDA)	Boston, Massachusetts
18 - 21	Prosecution Of Arson Cases (NCDA)	Philadelphia, Pennsylvania

May

16 - 21	Prosecutor's Office Administrator Course - Part I (NCDA)	Houston, Texas

June

4 - 11	Executive Prosecutor Course (NCDA)	Houston, Texas
27 - July 15	Career Prosecutor Course (NCDA)	Houston, Texas

STATE
OF
MONTANA

ATTORNEY GENERAL
MIKE GREELY

STATE CAPITOL HELENA, MONTANA 59601 TELEPHONE (406) 449-2026

28 July 1981

Ronald W. Smith
Hill County Attorney
Hill County Courthouse
Havre, Montana 59501

Dear Mr. Smith:

This letter is in response to your request for an opinion on the following question:

> Whether the State is obligated to pay the expenses incurred by privately employed defense counsel in the preparation of his case for trial?

While I have concluded that this question does not require an official opinion, the issue does warrant careful consideration. I am advising you that the State's obligation to pay the expense of defense counsel's interview with the pathologist rests within the sound discretion of the trial court.

The underlying facts are as follows: In August of 1980 deliberate homicide charges were filed in Hill County against Emil Longneck. Mr. Longneck employed private counsel. The State secured the services of a pathologist from Northern Montana Hospital, who performed an autopsy on the deceased; the pathologist was subsequently endorsed as a states witness on the information. Defense counsel interviewed the doctor on two occasions, while preparing Mr. Longneck's case for trial. The doctor billed defense counsel for time spent in the interviews and defense counsel asserts that the State should bear this expense.

Neither the Montana statutes relating to criminal procedure nor our cases on this subject provide a clear answer to this problem. Section 46-15-103, MCA, provides:

> When the defendant is indigent, a court order must be obtained if more than six witnesses are to be subpoenaed. If a witness is to be paid more than the regular fee or there are more than six witnesses to be paid, an order of the court or judge is needed. Such order may be made upon proper showing by affidavit or otherwise.

While the above provision is not directly on point, it does show that defense counsel must secure an order from the trial judge before incurring certain additional expenses, when those expenses will be paid by the State. Further, the Montana Supreme Court, in State v. Lande, Mont., 589 P.2d 666 (1979), indicated that the trial court must decide whether a defendant is entitled to appointed counsel at State expense. Thus, it is apparent that leave of court is required when a criminal defendant expects the State to bear certain costs associated with preparing his defense.

Several Montana cases have discussed the possibility that the State might pay the legitimate investigatory expenses of an indigent defendant. See, e.g. State v. Corliss, 150 Mont. 40, 430 P.2d 632, (1967). These cases have not addressed questions pertaining to the State's payment of these expenses when incurred by privately retained defense counsel. However, a significant body of federal statutory and case law has emerged which offers guidance in this area.

It has been suggested that in some instances the right to effective assistance of counsel, a right also guaranteed at the State level, might include the right to investigatory and expert witness services at State expense. Christian v. United States, 398 F.2d 517 (10th Cir. 1968). Also, the Criminal Justice Act of 1964, 18 U.S.C.A. section 3006(A)(e), indicates that investigatory and expert witness costs can be paid by the government when a criminal defendant is unable to afford those services. Accord, United States v. Bass, 477 F.2d 723 (9th Cir. 1973). Such expenses may be paid even if the defendant is represented by privately retained counsel when that defendant is unable to afford the additional costs of hiring investigators, interviewing State witnesses, or hiring his own expert witnesses. 6 A.L.R. Fed. 1007. However, the Criminal Justice Act and most of the cases contemplate that defense counsel will make some advance showing to the court that his client is unable to pay the additional costs, and that the services are necessary to an adequate defense.

In your situation counsel for Mr. Longneck made no advance showing so it cannot be said that Hill County is responsible for the cost of his interviews with the pathologist. Counsel may file a motion with the trial court requesting that the county bear this cost. The decision will then be left to the body with whom the discretion in this matter rests, the body with knowledge of all the facts pertinent to such a determination.

Very truly yours,

MIKE GREELY
Attorney General

County Government / Fallon

MH/sh

29 July 1981

Denzil R. Young
Fallon County Attorney
P.O. Box 620
Baker, Montana 59313

Dear Mr. Young:

In your letter of May 21 you asked whether your county treasurer should file claims in bankruptcy for property taxes. While it is clear that the treasurer is not required to file the claims, it is my advice that in many instances it would be advantageous to do so.

The primary reason for filing claims in bankruptcy is that the bankruptcy court has the power to sell the estate property free of liens. Then, of course, the proceeds of the sale can be used to satisfy unpaid tax bills. My recommendation is the same whether real or personal property is involved. Obviously, there will be some expense involved whenever claims in bankruptcy are filed, and consequently such filings are only practical when the unpaid taxes are of a sufficient amount.

We have spoken with the Department of Revenue, and they informed me that they regularly file these claims for taxes. Their reasoning is that "you have nothing to lose" by filing claims in bankruptcy, some advantages as to the priority of the claim may be gained, and the vast power of the bankruptcy court can aid in the eventual collection of the unpaid taxes, as noted above.

I hope that this has provided some guidance.

Very truly yours,

Mark Higgins
Legal Intern

John Maynard
Assistant Attorney General